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CITY OF MENLO PARK and
DAVE BERTINI

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

MICHAEL ZELENY, an individual

Plaintiff,

vs.

EDMUND G. BROWN, JR., an individual, in
his official capacity, et al.

Defendants.

Case No. 17-cv-07357-RS (NC)

**SETTLEMENT CONFERENCE
STATEMENT OF DEFENDANTS CITY OF
MENLO PARK AND DAVE BERTINI**

Date: October 19, 2021
Time: 9:30 a.m.
Judge: Magistrate Judge
Nathanael M. Cousins

Defendants City of Menlo Park and Dave Bertini submit the following Settlement
Conference Statement in accordance with Magistrate Judge Nathanael M. Cousins' Settlement
Conference Standing Order:

PERSONS ATTENDING

The following persons will be attending on behalf of defendant City of Menlo Park and
Dave Bertini:

City of Menlo Park City Attorney Nira F. Doherty of Burke, Williams & Sorensen, LLP;

1 Susan DeNardo of Sedgwick, the third-party administrator for this claim;

2 Robert J. Gundert of Howard Rome Martin & Ridley LLP, counsel of record for defendants
3 City of Menlo Park and Dave Bertini.

4 INTRODUCTION

5 This matter comes before the Court once again for a settlement conference, following the
6 outcome of cross-motions for summary judgment/adjudication. The outcome of those motions,
7 insofar as they involved plaintiff Michael Zeleny and defendants City of Menlo Park ("City") and
8 Dave Bertini was as follows:

9 a. The motion of plaintiff for summary adjudication of the claim that the City's special
10 event and film permitting processes were facially unconstitutional was granted and denied in all
11 other respects;

12 b. The motion of defendants for summary judgment was granted as to defendant Bertini
13 and denied in all other respects.

14 Shortly after the Court issued its order on July 13, 2021, counsel for plaintiff and counsel
15 for defendant City discussed settlement in general terms. Counsel for plaintiff stated that his office
16 was quite busy but they were working on an attorneys' fee demand, with redacted billing records,
17 that they hoped to be able to provide to the City soon. At various times since that conversation
18 counsel for defendant has asked about the status of the demand and documentation. Most recently,
19 on October 1, 2021, plaintiff's counsel responded to such an inquiry by stating, "We expect to have
20 that information next week."

21 In anticipation of receiving a demand a closed session was arranged with the City Council
22 for Tuesday, October 12, 2021 to discuss and evaluate plaintiff's anticipated demand. When no
23 demand had been received as of Monday, October 11, the closed session was canceled and counsel
24 for defendants wrote to plaintiff's attorneys to suggest that the settlement conference be continued.
25 A follow up phone call was made and a voice mail message was left with one of plaintiff's
26 attorneys on Tuesday (October 12) morning. No response has been received as yet.

Defendants will participate in the settlement conference but at this point it is not likely to be very productive. Defendant City is working on finishing up a motion for reconsideration of one particular point from the Court's ruling and order. It is proposed that the settlement conference be continued so as to allow plaintiff to prepare and submit a demand, preferably with the same sort of backup documentation that would be provided to the Court on a motion for attorneys' fees. Upon receipt of any such demand and documentation the City can then evaluate the matter and engage in settlement discussions accordingly.

FACTS

The most pertinent facts at this point in the lawsuit are contained within the Court's order granting in part and denying in part the parties' respective motions. A copy of that order is attached as Exhibit A. In short, the Court granted plaintiff's motion with regard to the facial challenges to the City's special event and film permit processes. Plaintiff's counsel has indicated they will seek an award of those attorneys' fees devoted to the prosecution of those claims.

CLAIMS AND DEFENSES

At this point, it is not possible to assess any claim for attorneys' fees.

In addition, defendant City is in the process of finishing up its motion for reconsideration. That motion will ask the Court to reconsider its implied ruling that plaintiff had standing to challenge the City's special event permit process even though that process did not apply to anything he wished to do. Plaintiff was told at the very outset and at each step along the way thereafter that he did not need a special event permit to protest and that his request to undertake a film project would require a film permit. The City's position is that First Amendment standing is not so broad as to permit a plaintiff to challenge the facial validity of a statute, ordinance or process that did not apply to the plaintiff's activities or proposed activities. In *Gill v. Whitford*, 138 S.Ct. 1916 (2018) the Supreme Court pointed out the three-part test that must be met for a plaintiff to have Article III standing, i.e., that plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable

judicial decision.” (*Gill, supra*, at p. 1929, citing *Spokeo, Inc. v. Robins*, 578 U. S. 330 (2016).)
 The plaintiff has not satisfied that test here, since the process he sought to invoke did not and does
 not apply to protests of film projects.

SUMMARY OF PROCEEDINGS TO DATE

As noted above, the Court has issued its order with regard to the parties’ separate motions
 for summary judgment or adjudication. A copy of that order is attached.

DEFENDANTS’ POSITION ON SETTLEMENT

With no demand and nothing upon which to evaluate any potential demand defendants are
 not in a position to take a position on settlement. Defendants will participate in the conference, but
 unless plaintiff is willing to drop his claim for attorneys’ fees it is doubtful that a settlement can be
 achieved at this time.

Date: October 12, 2021

HOWARD ROME MARTIN & RIDLEY LLP

By: _____

Robert J. Gundert
 Attorneys for Defendants
 CITY OF MENLO PARK and
 DAVE BERTINI

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Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY,
Plaintiff,

v.

ROB BONTA, et al.,
Defendants.

Case No. 17-cv-07357-RS

**ORDER GRANTING IN PART &
DENYING IN PART PLAINTIFF'S
MOTIONS FOR SUMMARY
JUDGMENT; GRANTING IN PART &
DENYING IN PART DEFENDANTS'
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

Michael Zeleny has endeavored over an extended period to stage a demonstration which would involve openly carrying a firearm in the midst of a major Silicon Valley thoroughfare. In Zeleny's view, multiple levels of California government have unconstitutionally blocked him from the ability to present such a demonstration without fear of prosecution. Four years ago, he began this legal action against the California Attorney General (in his official capacity, "the State"); the City of Menlo Park; and Dave Bertini, a since-retired Menlo Park police officer. In a collection of motions and cross-motions for summary judgment, the parties now bring this controversy to a head. For the reasons set forth herein, Zeleny's motion against the State is denied, while his motion against Menlo Park and Bertini is granted in part and denied in part. Conversely, the State's cross-motion is granted, and the cross-motion brought by Menlo Park and Bertini is granted in part and denied in part.

II. BACKGROUND

A. Zeleny & His Protest

In 2005, Zeleny began conducting a series of public protests against WebEx, a technology company, and New Enterprise Associates (“NEA”), a venture capital firm that helped take WebEx public. These protests were intended to convey that WebEx and NEA had “turned a blind eye” toward the alleged sexual improprieties of a WebEx co-founder (the father of Zeleny’s former girlfriend), rendering those businesses unfit for involvement in the public markets. Zeleny continued his crusade for the next seven years, holding dozens of events along Sand Hill Road outside of NEA’s Menlo Park headquarters. These events were provocative by design, often featuring animated depictions of child molestation. Relevant here, they also came to include Zeleny’s conspicuous carriage of unloaded military-grade firearms, as well as his donning of live ammunition belts and tactical combat fatigues, presumably to the alarm of passing motorists. These measures, according to Zeleny, “amplified” his message by more effectively drawing the attention of passersby. Beyond NEA’s sharp displeasure and occasional calls to the police, Zeleny’s protests during this period took place largely without incident.

B. California Law

Zeleny stopped regularly protesting in 2012. This development coincided with the legislative expansion of California’s ban on the open-carry of firearms. Section 26350 of the California Penal Code, effective January 1, 2012, criminalizes “openly carrying an unloaded handgun” in public places within incorporated municipalities and certain “prohibited” places within unincorporated areas. *See* Cal. Penal Code § 26350. Section 26400, adopted in 2013, extends this prohibition to any “unloaded firearm that is not a handgun[.]” *See* § 26400. Legislative history suggests these two statutes were passed in furtherance of California’s interest in reducing the violent encounters and expenditure of police resources associated with the public brandishing of firearms. *See, e.g., Nichols v. Harris*, 17 F.Supp.3d 989, 1004 (C.D. Cal. 2014) (reviewing “the [l]egislative [h]istories discussing [s]ections 26350 . . . and 26400”). Together,

they supplement California’s longstanding criminalization of openly carrying loaded guns.

Sections 26350 and 26400 share dozens of substantively identical exemptions. One pertains here: under § 26375 (or, for non-handguns, the closely analogous terms of § 26405(r)), California’s unloaded open carry ban does not apply to:

[A]n authorized participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture, television or video production, or entertainment event, when the participant lawfully uses the handgun as part of that production or event, as part of rehearsing or practicing for participation in that production or event, or while the participant or authorized employee or agent is at that production or event, or rehearsal or practice for that production or event.

Cal. Penal Code § 26375; *see also* § 26405(r).¹ Neither the Penal Code nor any other source of law defines the phrase “authorized participant” for purposes of this exemption.

Separately, in a neighboring section of the Penal Code, California offers “[a]ny person who is at least 21 years of age” the opportunity to secure “an entertainment firearms permit” (“EFP”). *See* § 29500. Administered by the California Department of Justice on a “shall-issue” basis, an EFP “authorizes the permitholder to possess firearms loaned to the permitholder for use solely as a prop in a motion picture, television, theatrical, or other entertainment production or event.” *See* §§ 29500, 29515. While the language of this statute speaks to the firearm’s being “loaned to” the permitholder, in practice an EFP additionally authorizes the permitholder (typically a professional “propmaster”) to lend the firearm out to a given production’s actors without the need for actor-by-actor background checks or waiting periods.

C. Zeleny’s Permitting Efforts

In 2015, after a years-long hiatus in his routine, Zeleny sought to resume publicly demonstrating outside of NEA’s headquarters. Wary of criminal liability, he decided that all of his future protests would be filmed for online distribution, on the theory that doing so would make him (the end product’s “producer”) an “authorized participant” within the meaning of sections

¹ For simplicity’s sake, this order refers to § 26375 and § 26405(r) collectively as “the ‘entertainment event’ exemption.”

26375 and 26405(r). He also decided to secure a permit, formally sanctioning his renewed campaign, from Menlo Park. Of the two permitting channels he pursued—one for a “special event permit” (“SEP”), the other for a film permit—neither proved successful.

1. Special Event Permit

In Menlo Park, an SEP is mandatory for any event “meet[ing] one or more of” certain criteria. *See* Dkt. 162-1 at 747. Those criteria include “us[ing] any City street, sidewalk, or other right-of-way,” “impacting traffic or intersections,” “generat[ing] a crowd of spectators sufficient in size to obstruct, delay or interfere with the normal flow of . . . traffic,” “occurring for more than 1 day,” and “needing police regulation, monitoring or control.” *Id.* Through an SEP FAQ document, the City advises applicants:

Approval or denial of applications [is] based upon several factors including: size (number of people), scale, location, route to be closed, community impact, impact on City services, past practices/experiences with issued permits, intended use, non-payment of fees, poor articulation of event as reflected in the application and site map, etc.

Id. at 750. The City acknowledges this list is non-exhaustive, and comprised in part of phrases lacking official definition (*e.g.*, “community impact,” “past practices/experiences with issued permits,” “intended use”).

Once City staff are satisfied with an application’s “completeness,” the application is circulated for review “to those City departments whose input is needed.” Dkt. 160 at 10. Following successful cross-departmental review, an application is forwarded to the City’s “Special Event Permit Committee.” *Id.*; *see also* Dkt. 162-1 at 750. “Determination of the approval or denial of any application is at the discretion of the Special Event Permit Committee,” which applies the FAQ document’s “several factors.” *See* Dkt. 162-1 at 750. When an application is denied, the applicant may appeal first “at the departmental level”; then at “a de novo hearing before the City Manager”; and “thereafter, if necessary, [at] a final hearing before the City Council.” Dkt. 160 at 10. Historically, SEPs have been approved for “run/walk events, concerts, block parties, large birthday parties on public property, car shows, movie nights, small parades

and fundraisers.” *Id.* at 9-10.

Zeleny applied for an SEP in July 2015, indicating his desire to stage an “indefinite” protest on the median of Sand Hall Road featuring “fully operational, exposed and unloaded military grade firearms and loaded ammunition feeding devices therefor,” a 55-inch screen for “representations of sexual violence,” and sound amplification equipment. *Id.* at 10-11. Because he intended to maintain his protest around the clock, Zeleny further requested permission to park his truck on the median, sleep in it, and install both a portable toilet and night-time lighting at the protest site. *Id.* at 11.

The City denied Zeleny’s application in a September 2015 email, explaining it was “incomplete and [did] not meet the criteria of a special event.” Dkt. 162-2 at 76. Regarding incompleteness, the City cited Zeleny’s failure to indicate “the exact location of the proposed event,” the precise layout of his “portable restroom, temporary lighting, sound system, etc.,” and “the end time for the event[.]” *Id.* Regarding special event “criteria,” the City advised:

[W]hat you have set forth in your application is not an event that meets the City’s definition of a special event. For example, the proposed event application states that it will not exceed 150 people, use any City street or right of way (even though the median is part of the right of way), require lane closures, require parking needs, [or] generate a crowd of spectators, nor does it state that this is a community type event. To the contrary, you are proposing a “media production” of a one-man protest. If what you are actually intending is filming a movie, then the city has an application process, for which a film production permit is required. A copy of the City’s “Film Production in Menlo Park” document is attached for your review.

Id. at 76-77. “Another concern,” the email went on, “is that it is illegal to open carry a firearm in the State of California.” *Id.* at 78.

Zeleny responded to this denial letter with a revised SEP application stating the event’s duration would be limited to October. The City treated this document as a new application, which it denied. *See* Dkt. 160 at 12. After additional correspondence with the City, Zeleny proceeded through the SEP appeals process. In August 2016, the City Manager upheld the (second) application’s denial. *Id.* at 13. The following month, Menlo Park informed Zeleny the City Council had voted unanimously to affirm the City Manager’s decision. *Id.*

2. Film Permit

Undeterred, Zeleny promptly asked the City to “reconsider” his SEP application as an application “requesting a film permit.” Dkt. 162-2 at 252. The City responded by sending Zeleny a “film permit application” packet. One document in this packet, entitled “Encroachment Permit Application,” solicits details regarding “construction” at the protest site. *Id.* at 248. Another document, entitled “Film Production in Menlo Park,” provides in part:

Permittee shall submit in writing all pertinent details regarding the filming including the date(s) and times of the filming including time needed for set-up and take down; a description of the nature of the filming; the location of the filming; a list of all equipment involved in the filming, including cars and other vehicles; the proposed location for the parking and storage of all such vehicles and equipment; the number of cast and crew members involved in the filming; and an indication of any special needs, such as amplified noise, etc. If granted, the permit’s approval will be confined to such activities, locations and time schedules as submitted and approved.

Id. at 78.

In October 2017, Zeleny submitted a film permit application outlining a “live” internet documentary production of his protest. Consistent with the “Film Production in Menlo Park” guidelines, Zeleny stated that filming would end in December 2017; occur every weekday from 8:00AM to 6:00PM; and focus principally on the public reaction to his protest, as captured by cameras placed along each side of Sand Hill Road. *See id.* at 237-39. Between November and December of that year, an assistant City Attorney pressed Zeleny for more information, including the “types” and “serial numbers” of any guns he intended to use, “what directions [Zeleny] intend[ed] to face” the guns, the names of Zeleny’s cast and crew, and other items needed for the City to feel “comfortable in its understanding of what [Zeleny was] proposing and . . . satisfied that [the proposal would] be done in a way that is safe and acceptable.” *See* Dkt. 162-1 at 744-45. By the year’s end, this dialogue broke down over legal arguments as to the City’s authority to demand information omitted from any written policy.

D. Bertini

1 Defendant Dave Bertini served as a commander in the Menlo Park Police Department
2 (“MPPD”) during Zeleny’s above-described permitting quest. While not officially responsible for
3 oversight of the permitting process,² the record is clear that Bertini operated as a “point person” in
4 the Zeleny matter. Bertini retired from the MPPD in July 2020.

5 III. LEGAL STANDARD

6 Summary judgment is proper “if the movant shows that there is no genuine dispute as to
7 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
8 The purpose of summary judgment “is to isolate and dispose of factually unsupported claims or
9 defenses.” *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party “always bears the
10 initial responsibility of informing the district court of the basis for its motion, and identifying
11 those portions of the pleadings and admissions on file, together with the affidavits, if any, which it
12 believes demonstrate the absence of a genuine issue of material fact.” *Id.* at 323 (internal citations
13 and quotation marks omitted). If it meets this burden, the moving party is then entitled to
14 judgment as a matter of law when the non-moving party fails to make a sufficient showing on an
15 essential element of the case with respect to which he bears the burden of proof at trial. *Id.* at 322-
16 23.

17 The non-moving party cannot defeat the moving party’s properly supported motion for
18 summary judgment simply by alleging some factual dispute between the parties. To preclude the
19 entry of summary judgment, the non-moving party must bring forth material facts, *i.e.*, “facts that
20 might affect the outcome of the suit under the governing law Factual disputes that are
21 irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
22 247-48 (1986). The opposing party “must do more than simply show that there is some
23 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S.
24 574, 588 (1986).

25
26 ² In 2015, for instance, when Zeleny submitted his first SEP application, an officer with the
27 surname “Ortega” was the appointed MMPD representative for the cross-departmental phase of
28 SEP review.

1 The trial court must draw all reasonable inferences in favor of the non-moving party,
2 including questions of credibility and of the weight to be accorded particular evidence. *Masson v.*
3 *New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991) (internal citations and quotation marks
4 omitted). It is the court's responsibility "to determine whether the 'specific facts' set forth by the
5 nonmoving party, coupled with undisputed background or contextual facts, are such that a rational
6 or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Service v.*
7 *Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). "[S]ummary judgment will not lie if
8 the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury
9 could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here
10 the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,
11 there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

12 IV. DISCUSSION

13 Zeleny brings one summary judgment motion against the State, and one against Menlo
14 Park and Bertini. Defendants oppose, and bring two corresponding cross-motions of their own.
15 Together, these papers cover the three cornerstones of Zeleny's case: (i) a set of facial
16 constitutional challenges to the "entertainment event" exemption to California's ban on the open-
17 carry of firearms, (ii) a set of facial and as-applied constitutional challenges to Menlo Park's SEP
18 and film permitting processes, and (iii) a claim under *Ex Parte Young* against Bertini.³ While
19 Zeleny is entitled to relief on the second front, the first and third fall dispositively in defendants'
20 favor.

21 A. The "Entertainment Event" Exemption

22
23 ³ At the time of their filing, the instant motions contemplated Zeleny's blanket Second
24 Amendment challenge to California's open carry ban. Since then, the Ninth Circuit has held "that
25 government regulation on open carry . . . fall[s] outside the Second Amendment's scope, and thus
26 may be upheld without further analysis." *Young v. Hawai'i*, 992 F.3d 765, 813 (9th Cir. 2021)
27 (internal quotation marks and citation omitted). "[R]espectfully disagree[ing] with" this decision,
28 Zeleny nevertheless recognizes that, before this Court, *Young* is "dispositive of [his] broad claim
that California's Open Carry Ban violates the U.S. Constitution." See Dkt. 186 at 3.

1 Spurred on by the City's position that his proposed use of firearms would be illegal,
2 Zeleny effectively contends that if his protest does not fit within the "entertainment event"
3 exemption, then the exemption itself must be illegal. He presses this point with arguments rooted
4 in the void-for-vagueness doctrine, the First Amendment, and the Equal Protection Clause. These
5 efforts come up uniformly short.

6 **1. The Void-for-Vagueness Doctrine**

7 A penal statute can run afoul of the void-for-vagueness doctrine in one of two ways: by
8 "fail[ing] to provide a person of ordinary intelligence fair notice of what is prohibited," or by
9 being "so standardless that it authorizes or encourages seriously discriminatory enforcement."
10 *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal quotation marks and
11 citation omitted). In applying this standard, a court must bear in mind that "a law is not
12 unconstitutionally vague simply because it is difficult to determine [its applicability] in a
13 particular case"; instead, the guiding concern is whether it presents "an unreasonable amount of
14 indeterminacy or subjectivity regarding what is . . . being prohibited[.]" *United States v. Lucero*,
15 989 F.3d 1088, 1101 (9th Cir. 2021) (internal quotation marks and citations omitted). Absent this
16 rare degree of deficiency, a law may not be held void merely because it is "marked by flexibility
17 and reasonable breadth, rather than meticulous specificity[.]" *Id.* (internal quotation marks and
18 citations omitted).

19 Here, zeroing in on the "entertainment event" exemption's use of the term "authorized
20 participant" (without an explanation of who does the authorizing), Zeleny insists the
21 "entertainment event" exemption is unconstitutionally vague. To be sure, in doing so, he
22 persuasively demonstrates "that this statute is not a model of clarity." *Lucero*, 989 F.3d at 1097.
23 Where Zeleny falters is in highlighting "an unreasonable amount of indeterminacy" around what
24 the statute does—or more accurately given its exemptive function, does not—prohibit. *Id.* at 1101
25 (internal quotation marks and citations omitted). Pointing to the phrase "a motion picture,
26 television or video production, or entertainment event," the State asserts an ordinarily intelligent
27 person would understand the "entertainment event" exemption to address the entertainment
28

1 industry, which in turn follows a well-settled industry practice in the handling of firearms as
2 props. That practice includes (i) securing permits for production in general, (ii) retaining the
3 services of an armorer, propmaster, or other EFP permit-holder, and (iii) limiting any open
4 carriage of firearms in both physical scope (*i.e.*, to a clearly demarcated “set”) and temporal
5 duration. Thus, in the State’s reading, sections 26375 and 26405(r) exempt from the open-carry
6 ban persons authorized to perform in an entertainment event (by that event’s director, producer, or
7 other like figure), so long as the event observes these longstanding conventions.

8 Of course, the State’s interpretation, standing alone, is of no special consequence to the
9 vagueness inquiry. Yet as Zeleny cannot escape, it is an interpretation shared by both of his
10 experts—and that does matter. *See Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir.
11 1981) (citation omitted) (testing an industry-oriented statute for vagueness from the perspective of
12 “a reasonably prudent” industry actor). Film professional Robert Brown, for instance, indicates
13 that while a director generally “authorizes” a production’s gun-toting participants, such a
14 production always involves obtaining film permits, hiring a EFP-holding propmaster or armorer,
15 and notifying “residents and businesses within a 500-foot radius of [the] location about the
16 upcoming shoot[.]” *See* Dkt. 163-1 at 75-77. Michael Tristano, also of the entertainment industry,
17 attests to much the same. *See* Dkt. 163-1 at 60-62. In short, then, when it comes to the
18 “entertainment event” exemption, the evidence confirms that the parties *agree*. Because this is a
19 far cry from any showing of “unreasonable” confusion surrounding the exemption, Zeleny’s
20 motion is denied as to his void-for-vagueness challenge. *See Lucero*, 989 F.3d at 1101 (internal
21 quotation marks and citation omitted).

22 2. The First Amendment

23 To bring a facial First Amendment challenge, a plaintiff “need show only that a substantial
24 number of the law’s applications are unconstitutional, judged in relation to the statute’s plainly
25 legitimate sweep.” *Knox v. Brnovich*, 907 F.3d 1167, 1180 (9th Cir. 2018) (internal quotation
26 marks, bracketing, and citations omitted). This standard, while applicable to expressive conduct,
27 does not permit “an apparently limitless variety of conduct [to] be labeled ‘speech’ whenever the
28

1 person engaging in the conduct intends thereby to express an idea.” *Id.* at 1181 (internal quotation
2 marks and citation omitted). Instead, “the First Amendment protects only conduct that is intended
3 to convey a particularized message,” and only when “the likelihood is great that the message
4 would be so understood.” *Id.* (internal quotation marks and citations omitted). Where an
5 “individual[] claiming the protection of the First Amendment” fails to “carry the burden of
6 demonstrating that [his or her] nonverbal conduct meets . . . [this] standard,” the individual’s
7 challenge likewise fails.

8 Zeleny rightly observes that the “entertainment event” exemption creates distinctions
9 regarding who may and may not openly carry firearms. Those distinctions discriminate against
10 certain speakers, he argues, by depriving their speech of open carriage’s expressive value: the
11 “amplification” of the message of the open carrier. *See* Dkt. 171 at 12. At a certain level, the
12 notion of guns-as-amplifiers is fairly obvious, as a firearm in plain view tends to draw attention.
13 Zeleny errs, however, in conflating amplification with constitutionally significant expression. By
14 building his First Amendment challenge exclusively upon firearms’ capacity to enhance a
15 thematically unrelated message,⁴ Zeleny all but stipulates that the “nonverbal conduct” for which
16 he seeks protection does not convey “a particularized message” of its own. *See Knox*, 907 F.3d at
17 1181 (internal quotation marks and citations omitted). In other words, weapons have no
18 substantive bearing on Zeleny’s protected expression. They just make it louder.

19 Nor would assuming Zeleny’s desired use of firearms is expressive conduct greatly aid his
20 case. Under the test articulated by the Supreme Court in *United States v. O’Brien*, “when ‘speech’
21 and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important
22 governmental interest in regulating the nonspeech element can justify incidental limitations on
23 First Amendment freedoms.” 391 U.S. 367, 376 (1968). In his papers, Zeleny ignores *O’Brien*’s
24 intermediate level of scrutiny altogether—and for good reason. The objects of California’s open
25

26 _____
27 ⁴ This order does not pass upon the expressive value of openly carrying firearms during a protest
28 with an underlying message involving firearms.

1 carry legislation (husbanding law enforcement resources and preventing needless armed conflict)
2 are plainly important. As for tailoring, the exemption Zeleny targets is one of dozens, strongly
3 suggesting whatever “incidental restriction on alleged First Amendment freedoms” the legislation
4 might represent “is no greater than is essential to the furtherance of [those] interest[s].” *Id.* at 377.
5 In sum, Zeleny’s speaker-discrimination theory stumbles both out of the gate and further down the
6 analytical track. The First Amendment portion of his motion against the State accordingly is
7 denied.

8 **3. The Equal Protection Clause**

9 The Fourteenth Amendment’s guarantee of equal protection under law “ensures that all
10 persons similarly situated should be treated alike.” *Engquist v. Oregon Dep’t of Agr.*, 478 F.3d
11 985, 992 (9th Cir. 2007) (internal quotation marks and citation omitted), *aff’d*, 553 U.S. 591
12 (2008). A law that “neither proceeds along suspect lines nor infringes fundamental constitutional
13 rights is subject to rational basis review and, as such, does not violate the Equal Protection Clause
14 if there is any reasonably conceivable state of facts that could provide a rational basis for the
15 classification.” *Franceschi v. Yee*, 887 F.3d 927, 940 (9th Cir. 2018) (internal quotation marks and
16 citation omitted).

17 The contours of Zeleny’s Equal Protection claim are made difficult to discern by his scant
18 briefing of the issue. *See generally* Dkt. 163 at 27-28 (committing one page to Equal Protection
19 Clause argument). Even so, this much is clear: the “entertainment event” exemption does not
20 “proceed along suspect lines . . . [or] infringe[] [a] fundamental constitutional right[.]”
21 *Franceschi*, 887 F.3d at 940 (internal quotation marks and citation omitted); *see also* Dkt. 163 at
22 27-28 (failing to identify any suspect classification); *supra*, Part IV.A.2 (explaining the
23 “entertainment exemption” does not infringe the First Amendment); *Young v. Hawai’i*, 992 F.3d
24 765, 813 (9th Cir. 2021) (ruling that “regulations on open carry” do not implicate a fundamental
25 Second Amendment right) (citation omitted). Rational basis is thus the appropriate standard of
26 review; and for the same reasons it passes muster under *O’Brien*, the “entertainment event”
27 exemption surely clears this relatively modest hurdle. To the degree Zeleny’s motion seeks
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judgment of his entitlement to relief under the Equal Protection Clause, it is denied.

B. Menlo Park Permitting Processes

Zeleny attacks the City's SEP and film permitting schemes, which he characterizes as unlawful prior restraints, on both a facial and as-applied basis. Both schemes are facially infirm, obviating the need to reach the as-applied component of his challenge.

1. Mootness

Menlo Park urges, for the first time at summary judgment, that "after this lawsuit was filed . . . the City discovered the median in question is owned by the State of California and thus not subject to the City's jurisdiction." *See* Dkt. 160 at 15 ("The State's ownership and control of the median was discovered by Assistant City Attorney Nicolas A. Flegel while handling another lawsuit involving the City.") (citations omitted). Under this theory, since "the City had (and has) no authority to issue" Zeleny an SEP permit for the Sand Hill Road median, "there is no longer a 'live controversy' relating to the non-issuance of the SEP[.]" *Id.* at 16.

This assertion, relied upon by Menlo Park to a surprising degree, does not warrant prolonged consideration. Because Zeleny challenges the permitting processes as facially invalid prior restraints, his standing is not a function of his having "appl[ied] for, and be[en] denied" any one particular permit. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (citations omitted). So long as the processes remain in place and controlling over any future application he might submit,⁵ his claims against Menlo Park are justiciable.

2. SEP Permitting Process

"[P]ermitting schemes are subject to facial challenge if they have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat that protected speech or conduct will be suppressed." *Epona v. County of Ventura*, 876 F.3d 1214, 1221 (9th Cir. 2017) (internal quotation marks and citation omitted). Where such a nexus

⁵ Zeleny has made clear to the City that "he would relocate" from the median "if needed." *See* Dkt. 173 at 7.

1 exists, two requirements apply. First, the scheme must have “narrow, objective, and definite
2 standards to guide the licensing authority[.]” *Id.* at 1222 (internal quotation marks and citations
3 omitted). Second, the scheme must “guarantee that the licensor will, within a specified brief
4 period, either issue a license or go to court[.]” *Id.* at 1225 (internal quotation marks and citation
5 omitted). If these requirements are not met, the scheme “confer[s] unbridled discretion on
6 permitting officials in violation of the First Amendment.” *Id.* at 1226 (citation omitted).

7 Zeleny’s leading case on permitting schemes is *Epona v. County of Ventura*, 876 F.3d
8 1214 (9th Cir. 2017). There, the Ninth Circuit examined seven factors used by local officials in
9 reviewing a landowner’s application for a conditional use permit to host wedding ceremonies.
10 Observing that “if one condition confers an impermissible degree of discretion, the specificity of a
11 separate condition will not save the scheme,” the court focused on the county’s requirements that
12 the proposed use (i) “not . . . [be] obnoxious or harmful, and must not impair the utility of
13 neighboring property or uses,” and (ii) “not [be] detrimental to the public interest, health, safety,
14 convenience, or welfare.” *Id.* at 1223-24 (internal quotation marks and citation omitted). Factoring
15 the “abstract language” of these conditions into “the totality” of the scheme’s constituent parts, the
16 court held that the county “fail[ed] to provide definite and specific guidelines for permitting
17 officials.” *Id.* at 1225 (citation omitted). Considered alongside the scheme’s “failure to provide
18 any limitation on the time period within which a permit must be approved,” this defect amounted
19 to an unlawful prior restraint. *Id.* at 1226 (citation omitted).

20 As Zeleny convincingly demonstrates, Menlo Park’s SEP process is inconsistent with
21 *Epona*’s mandate. Of the ten enumerated criteria by which the City determines applications, at
22 least three—“community impact,” “past practices/experiences with issued permits,” and “intended
23 use”—trade in patently opaque terms. An applicant searches in vain for any official guidance as to
24 how they will be applied; and even now, at this late litigative stage, the City offers none. More
25 troubling still, and as the “etc.” appended to this list signals, unenumerated considerations
26 apparently play an equally hefty role in officials’ deliberations. Nor, supposing an applicant
27 survives this gauntlet of stated and secret conditions, can he or she be confident of approval.
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1 Ultimately, “[d]etermination of the approval or denial of any application is at the discretion of the
2 Special Event Permit Committee.”

3 Curiously, Menlo Park does not match Zeleny’s *Epona* argument with one of its own.
4 Rather, the City advances the proposition that the SEP permitting scheme “does not substantially
5 reach or regulate constitutional activity,” and therefore is not subject to a facial challenge.
6 Specifically, the City maintains:

7 The City’s SEP process does not substantially reach or regulate constitutional
8 activity. Permits have typically been issued for events such as fun runs/walks,
9 block parties, car shows, *concerts*, *movie nights* and large birthday parties.

10 Dkt. 160 at 25 (emphasis added); *see also id.* at 10 (classifying “small parades and fundraisers” as
11 special events as well). The City is mistaken. Unlike *Epona*’s wedding ceremonies, a “concert”
12 does not bear a “close . . . nexus to expression”—it *is* expression. *See Epona*, 876 F.3d at 1221
13 (internal quotation marks and citations omitted). That the City suggests otherwise, in lieu of
14 defending its SEP permitting process on the merits, is beside the point. Zeleny has offered ample
15 proof that the SEP permitting process lacks “narrow, objective, and definite standards,” and the
16 City has offered no serious rebuttal. *See id.* at 1222 (internal quotation marks and citations
17 omitted). As a matter of law, Zeleny’s motion for judgment that the SEP permitting process is a
18 facially invalid prior restraint must be granted.

19 **3. Film Permitting Process**

20 Zeleny’s film permitting argument is similarly compelling. Following Zeleny’s request that
21 the City “reconsider” his SEP application as “requesting a film permit,” the City sent Zeleny two
22 documents: an “Encroachment Permit Application” (covering any construction that might occur
23 during film production) and a “Film Production in Menlo Park” pamphlet (covering the actual film
24 production). The latter document instructs applicants to submit certain “pertinent details,” such as
25 “the date(s) and times of the filming including time needed for set-up and take down,” a
26 “description of the nature of the filming,” and “the location of the filming[.]” In late 2017, Zeleny
27 sent the City an email following these instructions; the City responded, asking for additional
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1 information; and this lawsuit ensued.

2 Yet, in an bold display of revisionism, Menlo Park now argues that there is no film
3 permitting process beyond the encroachment permitting process, such that scrutiny of the former
4 must be strictly limited to Chapter 13.18 of the Menlo Park Municipal Code, which governs the
5 latter. *See* Dkt. 172 at 16. That ordinance, titled “Use of Public Rights-of-Way,” is silent as to
6 filming, film production, or any manner of entertainment. It does, however, provide that an
7 encroachment permit is necessary for persons seeking to “perform any work, construct any
8 facility, make any excavation or fill any excavation, store materials and/or vehicles in or upon any
9 real property in which the City has an interest,” and so on. Thus, the City submits, “when a film
10 production involves operations within a public right-of-way[,] Chapter 13.18”—the provisions of
11 which “express no preference whatsoever about speech content”—applies in a constitutionally
12 appropriate fashion. *See* Dkt. 168 at 14.

13 This position, accompanied by little more than a perfunctory acknowledgement of the
14 “Film Production in Menlo Park” document’s existence, misses the mark. True, when Zeleny
15 broached the topic of a film permit, the City sent him a Chapter 13.18 construction-oriented form.
16 That undisputed fact, though, does not somehow negate that the City *also* sent him a film-oriented
17 form, relaying requirements irrefutably alien to Chapter 13.18. Like the SEP documents, that latter
18 form included approval criteria, including one factor (“the nature of the filming”) of a highly
19 subjective nature; and like the SEP permitting process, those criteria are apparently non-
20 exhaustive, as evidenced by Menlo Park’s request that Zeleny submit additional data so the City
21 could feel “comfortable” and “satisfied” with the proposal. Moreover, and turning to *Epona*’s
22 second prong, between the “Film Production in Menlo Park” document and Chapter 13.18, a film
23 permit applicant finds nothing in the way of a “guarantee that the licensor will, within a specified
24 brief period, either issue a [film permit] or go to court[.]” *Epona*, 876 F.3d at 1225 (internal
25 quotation marks and citation omitted). Even accepting the City’s invitation to focus only on
26 Chapter 13.18, this independently undermines the constitutionality of the film permitting process.
27 Consequently, and as with its SEP analogue, the City’s film permitting process is an unlawful
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1 prior restraint.

2 **C. Bertini**

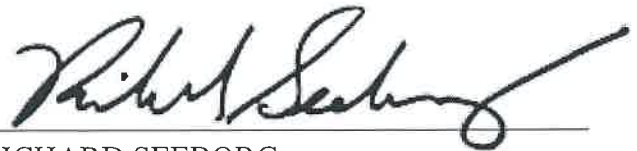
3 Zeleny seeks injunctive relief against Bertini under *Ex Parte Young*, which permits
 4 “actions seeking only prospective declaratory or injunctive relief against state officers in their
 5 official capacities.” *Los Angeles County Bar Assoc. v. Eu*, 979 F.3d 697, 704 (9th Cir. 1992).
 6 Because Bertini has retired, “*prospective* declaratory or injunctive relief against [him] . . . in [his]
 7 *official capacit[y]*” is no longer available. *Id.* (emphasis added). Bertini is therefore entitled to
 8 summary judgment that Zeleny’s *Ex Parte Young* claim against him fails as a matter of law.

9 **V. CONCLUSION**

10 Consistent with the foregoing, Zeleny’s motion for summary judgment against the State is
 11 denied in its entirety, and the State’s cross-motion for summary judgment is granted in its entirety.
 12 Zeleny’s motion for summary judgment against Menlo Park and Dave Bertini is granted as to its
 13 request for judgment that Menlo Park’s SEP permitting process and film permitting process are
 14 facially unconstitutional prior restraints, and denied in all other respects. The cross-motion for
 15 summary judgment brought by Menlo Park and Dave Bertini is granted as to its request for
 16 judgment that Zeleny may not seek injunctive relief against Bertini under *Ex Parte Young*, and
 17 denied in all other respects. The Status Conference previously set in this matter for August 12,
 18 2021 is hereby vacated. The parties shall file a Joint Status Report, detailing the remaining issues
 19 in this case, if any, no later than August 6, 2021.⁶

20 **IT IS SO ORDERED.**

21 Dated: July 13, 2021



RICHARD SEEBORG
Chief United States District Judge

26 _____
 27 ⁶ Because they contest evidence immaterial to the outcome of this order, Zeleny’s various
 28 evidentiary objections, *see* Dkts. 169-3, 173-1, 155, are overruled.